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Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

No. 05-1496

In the Supreme Court of the United States

DR. KIRSTEN KNUDSEN, D.C., CHRIS BAKER AND VIKKI BAKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In March 2000, petitioners filed this action against Liberty Mutual Insurance Company ("Liberty") in state court on behalf of a putative class of claimants under casualty policies issued by Liberty. In September 2005, the state court greatly expanded the case by issuing a class-certification order permitting petitioners to sue Liberty on behalf of a nationwide class including not only claimants under casualty policies issued by Liberty, but also claimants under casualty and group-health policies issued by thirty-five of Liberty's affiliates and subsidiaries. Liberty then removed the case under the Class Action Fairness Act of 2005 ("CAFA"), which authorizes removal of certain interstate class actions "commenced" on or after February 18, 2005.

The question presented is whether the Court should review the Seventh Circuit's fact-bound determination that the state court's September 2005 class-certification order commenced a new action removable under CAFA because it added new claims that do not relate back to the filing of petitioners' pre-CAFA pleadings under Illinois law.

RULE 29.6 STATEMENT

The following is a list of all corporate parents of respondent Liberty Mutual Insurance Company:

Liberty Mutual Holding Company, Inc.

LMHC Massachusetts Holdings, Inc.

Liberty Mutual Group, Inc.

Neither respondent Liberty Mutual Insurance Company nor any of its corporate parents is a publicly traded corporation. Thus, no publicly held company owns 10 percent or more of the stock of Liberty Mutual Insurance Company.

Further, none of the subsidiaries of respondent Liberty Mutual Insurance Company is a publicly traded company. Each is either owned entirely by Liberty Mutual Insurance Company or owned partly by Liberty Mutual Insurance Company and partly by one or more other subsidiaries of the three corporate parents listed above. Thus, no publicly held company owns 10 percent or more of the stock of any subsidiary of Liberty Mutual Insurance Company.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

In a fact-bound opinion, a unanimous panel of the Seventh Circuit concluded that a class-certification order issued by the state court after CAFA's enactment "commenced" new litigation that was removable under CAFA because it added new claims that do not relate back to petitioners' pre-CAFA pleadings under Illinois law. Petitioners' request for rehearing and rehearing en banc was unanimously denied.

Petitioners fail to advance any reason that would warrant this Court's review. Although petitioners strain to manufacture a conflict, in reality the courts of appeals have uniformly held that post-CAFA conduct such as the massive change of the case here can commence a new action and thus permit removal under CAFA. Nor do petitioners identify any extraordinary circumstance that might justify review in the absence of a conflict. To the contrary, petitioners concede that Illinois law governs whether the state court's class-certification order commenced a new action. Moreover, petitioners' contention that this Court's review is necessary is belied by the fact that the number of cases presenting the question whether (and under what circumstances) a defendant may remove a pre-CAFA case based on post-CAFA conduct diminishes with each passing day.

Rather than explain why this Court's review is needed, petitioners attempt to impugn Liberty's conduct in this litigation through a series of baseless charges that lack a single citation to the record. But as the facts described below demonstrate—and as the Seventh Circuit expressly concluded—"[t]he conduct of plaintiffs and the state judge in this litigation, turning an arguable error in discovery into a sprawling proceeding in which [Liberty] will be required to pay on account of other insurers' decisions taken long ago under different rules for calculating proper payment, and without any opportunity to defend itself on the merits or even insist that the policies' actual terms be honored, illustrates why Congress enacted the Class Action Fairness Act." Pet. App. 7a.

STATEMENT

A. By Enacting CAFA, Congress Sought To Provide A Federal Forum To Resolve Class Actions Of Nationwide Importance.

In passing CAFA, Congress found that "there have been abuses of the class action device that have * * * harmed class members with legitimate claims and defendants that have acted responsibly." Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2)(A). Congress concluded that such abuses "undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." *Id.* § 2(a)(4). Congress further declared that "State and local courts are * * * keeping cases of national importance out of Federal court"; "sometimes acting in ways that demonstrate bias against out-of-State defendants"; and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Ibid.* Thus, one of the express purposes of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(2).

To effectuate that purpose, CAFA enlarged federal jurisdiction over certain class actions. Thus, subject to certain exceptions that are inapplicable here, CAFA permits defendants to remove putative class actions where: (1) the aggregate amount in controversy exceeds $5 million; and (2) minimal diversity exists, *i.e.*, at least one member of the class is a citizen of a different state from any defendant. 28 U.S.C. § 1453(b); see also 28 U.S.C. § 1332(d). Petitioners do not dispute that both of these requirements are satisfied here.

However, CAFA applies to "any civil action commenced on or after the date of enactment of this Act"—February 18, 2005—and this case was first filed before that date. Pub. L.

No. 109-2, § 9. The issue presented to the Seventh Circuit was whether the massive post-CAFA changes to this case, which were so significant that the newly added claims would not relate back under Illinois law, constituted commencement of a new action within the meaning of CAFA.

B. Petitioners' Pre-CAFA Pleadings Alleged A Narrow Class Limited To Persons Covered By Casualty Policies Issued By Liberty.

Petitioner Kirsten Knudsen filed this putative class action against Liberty in Cook County Circuit Court in March 2000, alleging breach of contract and consumer fraud. C.A. App., Tab 1. According to the complaint, Knudsen is a chiropractor who treated an injured worker covered under a workers' compensation policy issued by Liberty. *Id.* ¶ 18. The complaint alleged that the injured worker assigned to Knudsen his right to seek reimbursement from Liberty. *Id.* ¶ 20. The complaint further alleged that Liberty failed to reimburse Knudsen fully for certain procedures because Liberty used a medical cost and utilization database to adjust the charges for those procedures. *Id.* ¶ 4.

Defining "LIBERTY" to mean "Liberty Mutual Insurance Company," the complaint stated that Liberty's adjustment of medical claims under "casualty insurance written by LIBERTY" formed the "gravamen" of the lawsuit. C.A. App., Tab 1 ¶ 1. The complaint defined the following class:

> [A]ll LIBERTY insureds, their third party beneficiaries and their assignees who were entitled to payment of medical bills under any casualty coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S internal generated medical cost and utilization database.

Id. ¶ 10.

Knudsen filed an amended complaint in March 2001. C.A. App., Tab 2. Contrary to petitioners' unsupported contention that the amended complaint adopted an "open-ended description of the respondent Liberty," Pet. 4, the amended complaint specifically defined "LIBERTY" to mean "Liberty Mutual Insurance Company." C.A. App., Tab 2 ¶ 1; see also Pet. App. 13a ("The complaint defined 'LIBERTY' as Liberty Mutual Insurance Company—which is only natural, as it is the sole defendant"). Moreover, the amended complaint reiterated that Liberty's adjustment of medical claims under "policies written by LIBERTY" formed the "gravamen" of the suit. C.A. App., Tab 2 ¶ 1. The amended complaint defined the following class:

> [A]ll LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of medical bills under any medical payments coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S medical cost and utilization database.

Id. ¶ 11.

Thus, contrary to petitioners' assertion, both of Knudsen's pre-CAFA complaints defined a class limited to "LIBERTY insureds" under "LIBERTY insurance polic[ies]." As the Seventh Circuit noted, neither complaint so much as mentioned any of Liberty's affiliates or subsidiaries. Pet. App. 6a (petitioners' pre-CAFA pleadings "did not mention any insurer other than [Liberty] itself").

In December 2001, the state court denied Liberty's motion to dismiss the amended complaint. *Knudsen* v. *Liberty Mut. Ins. Co.*, 2001 WL 34401234 (Ill. Cir. Ct. Dec. 7, 2001). Although (a) the policy at issue provided workers' compensation insurance, (b) Knudsen's standing rested on an as-

signment of workers' compensation benefits that cannot be assigned, 820 ILCS 305/21, (c) Illinois trial courts "have no original jurisdiction over workers' compensation proceedings," *Hartlein* v. *Ill. Power Co.*, 601 N.E.2d 720, 727 (Ill. 1992), and (d) "Illinois law does not allow a provider of medical care to sue a workers' compensation carrier" in any forum, *Foster McGaw Hosp.* v. *Bldg. Material Chauffeurs, Teamsters & Helpers Welfare Fund*, 925 F.2d 1023, 1024 (7th Cir. 1991), the state judge nevertheless held that Knudsen's claims did not arise under the Illinois Workers' Compensation Act and that Knudsen could pursue her claims in state court. *Knudsen*, 2001 WL 34401234, at *2-4.

C. The State Court Struck Liberty's Answer And Affirmative Defenses.

In July 2003, Knudsen—by now joined by intervenors Chris and Vikki Baker—filed a motion for default based on Liberty's purported discovery violations. *Knudsen* v. *Liberty Mut. Ins. Co.*, 2004 WL 625679 (Ill. Cir. Ct. Mar. 26, 2004). Liberty responded by arguing, *inter alia*, that petitioners lacked standing because Liberty Mutual Fire Insurance Company ("Liberty Fire")—a separate affiliate of Liberty—wrote the policies underlying their claims. *Id.* at *1; see also Pet. App. 13a ("All three plaintiffs' claims derive from policies issued by Liberty Mutual Fire Insurance Company, an insurer with its own policies and reserves"). Petitioners "admitted that the policies indicate they were issued by Liberty Fire," but claimed that Liberty somehow "hid" Liberty Fire's identity as the correct defendant. *Knudsen*, 2004 WL 625679, at *1. Accepting petitioners' argument, the state court sanctioned Liberty for this purported misconduct by striking its answer and affirmative defenses. *Id.* at *5-6.[1]

[1] Petitioners tried to bolster their argument by manufacturing a nefarious motive—that Liberty hoped to hide the identity of the proper defendant (Liberty Fire) until the statute of limitations had run. Petitioners' motive theory foundered, however, on the undisputed fact that Liberty Fire offered to waive its limitations defense if petitioners sued the correct defen-

In reality, petitioners had long known that Liberty Fire issued the policies underlying their claims and was thus the proper defendant. As petitioners conceded and as the Seventh Circuit expressly found, "only Liberty Fire's name is on the policies." Pet. App. 3a. Moreover, petitioners received letters and other documents as early as 2001 that clearly identified Liberty Fire as the issuer of the policies. C.A. App., Tab 6 at 8-9 & Ex. 2. Indeed, long before CAFA was enacted, the Bakers named Liberty Fire as a defendant in a similar case that they had filed in Washington. *Id.*, Tab 36 at 5 n.3. The record therefore shows that, far from "hiding" Liberty Fire's identity as the correct defendant, Liberty informed petitioners of their mistake.

Given their longstanding knowledge that they sued the wrong defendant, petitioners' refusal to sue Liberty Fire can be explained only as a strategic choice. Under Illinois law, adding Liberty Fire as a defendant—as the Bakers did in their Washington case—would have entitled Liberty Fire to the substitution of a new judge. 735 ILCS 5/2-1001(a)(2). Dismissing this action against Liberty and filing a new action against Liberty Fire likewise would have resulted in the assignment of a new judge. Faced with these alternatives, petitioners chose to ignore the fact that they sued the wrong defendant in order to keep the case in front of a judge who had proven receptive to their claims.

D. The Seventh Circuit Rejected Liberty's Initial Removal.

On February 10, 2005, Liberty filed its principal brief in opposition to petitioners' motion for class-certification. C.A. App., Tab 9. Liberty argued, *inter alia*, that petitioners were inadequate representatives of the putative class because they based their claims on policies issued by Liberty Fire, not Liberty. *Id.* at 29-30. In a reply brief filed shortly after

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dant. C.A. App., Tab 19 at 1 & Ex. 1. As explained above, petitioners refused to name the proper defendant for their own strategic reasons.

CAFA's enactment, petitioners proposed to solve that problem by expanding their previously proposed class definition to include Liberty Fire's insureds:

> All Liberty Mutual Insurance Company and Liberty Fire Insurance Company insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

Id., Tab 10 at 2. Petitioners did not, however, add Liberty Fire as a defendant.

Liberty responded to the new class definition by removing the case to federal court under CAFA. Pet. App. 16a-17a. Liberty argued that petitioners' proposed addition of Liberty Fire's insureds to the class "commenced" a new action and that removal was therefore proper. *Id.* at 11a. The district court, per Judge Castillo, disagreed and remanded the case to state court. *Id.* at 10a.

Pursuant to 28 U.S.C. § 1453(c)(1), Liberty filed a petition for leave to appeal. The Seventh Circuit, per Judge Easterbrook, denied the petition. Pet. App. 9a-14a ("*Knudsen I*"). The court held that Liberty prematurely removed the case because the state judge had not yet "address[ed] the plaintiffs' latest proposal" to expand the class definition. *Id.* at 13a. However, the court recognized that "a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes." *Id.* at 12a. The court further stated that the commencement of a new action might "lie[] in store," explaining that petitioners could not establish liability based on policies

issued by Liberty Fire under the existing complaint because Liberty Fire was "not a party to the suit" and because "Plaintiffs do not contend" that Liberty and Liberty Fire "are alter egos." *Id.* at 12a-13a. Therefore, the court concluded, if Liberty Fire "should be added as a defendant, it could enjoy a right to remove under [CAFA]. for suit *against it* would have been commenced after February 18, 2005." *Id.* at 14a.

E. The State Court Certified A Nationwide Class Expanded To Include All Lines Of Insurance Issued By Liberty And Thirty-Five Of Its Affiliates And Subsidiaries.

Emboldened by the remand approved in *Knudsen I*, petitioners went back to state court and, as the Seventh Circuit later noted, sought "*much* more relief." Pet. App. 3a. Petitioners asked the state court to certify a class expanded to include claimants who sought medical benefits under any policies issued by Liberty and *thirty-five* of its affiliates and subsidiaries. *Ibid.* Petitioners defined the following class:

> All insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively "Liberty Mutual"), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

C.A. App., Tab 18 at 2; see also *id.*, Tab 16 at 12-13. Contrary to petitioners' unsupported contention that the proposed class definition "include[d] only those claims of insureds of Liberty, its affiliates or subsidiaries *which Liberty adjusted*," Pet. 20, the proposed definition contained no such limitation. Rather, the proposed definition included "[a]ll insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries * * * whose claims were paid for less than the medi-

cal charge, based upon the application of a medical cost and utilization database"—regardless of who adjusted the claims. C.A. App., Tab 18 at 2.

Despite proposing a class that encompassed Liberty's affiliates and subsidiaries, petitioners did not add any of those affiliates or subsidiaries as defendants—an act that clearly would have permitted removal under *Knudsen I*. Pet. App. 14a (stating that if Liberty Fire "should be added as a defendant, it could enjoy a right to remove"). Instead, petitioners added new claims by asking "the state court to hold [Liberty] responsible for *all* policies issued by any subsidiary or affiliate." *Id.* at 3a. Moreover, petitioners "proposed that they be certified to represent a nationwide class, and that the court disregard any difference in insurance and workers' compensation laws across the 50 states" notwithstanding binding precedent "describing the grave problems with class actions for damages under multiple states' laws." *Id.* at 4a.

The state court certified the nationwide class proposed by petitioners on September 29, 2005, with a few modifications that are not pertinent here. Pet. App. 4a. The state court reasoned that allowing petitioners to "attempt to recover from Liberty on behalf of the insureds of [its] affiliates and subsidiaries" was necessary "to prevent Liberty from continuing to benefit from its improper discovery conduct." C.A. App., Tab 18 at 9. To hold otherwise, the court stated, would render the pre-certification "default against Liberty meaningless." *Ibid.*

As an additional justification for allowing petitioners to sue Liberty based on policies issued by its affiliates and subsidiaries, the state court credited petitioners' assertion that Liberty "and its affiliates filed one income tax return; there was one board of directors making the decision for investments for all companies; and Liberty provides the office space, the employees and the adjusting for all the companies." C.A. App., Tab 18 at 9. In fact, as the Seventh Circuit later recognized, Liberty "does *not* adjust all demands for

payment of all of its affiliates' policies." Pet. App. 6a (emphasis added). Indeed, the state court's class-certification order added claims based on policies issued and adjusted by some of Liberty's affiliates and subsidiaries before they even became affiliated with Liberty. Those claims include:

- claims under workers' compensation policies issued by Bridgefield Employers Insurance Company and Bridgefield Casualty Insurance Company and adjusted by their vendor from 1994 through 1997, before those companies became affiliated with Liberty in 1998 (C.A. App., Tab 22 at 1-2);
- claims under auto policies issued by Oregon Auto Insurance Company and North Pacific Insurance Company and adjusted by their vendor in 1998 and 1999, before those companies became affiliated with Liberty in 2002 (C.A. App., Tab 23 at 1-2); and
- claims under group health policies issued and adjusted by Employers Insurance Company of Wausau from 1985 to 1997, before it became affiliated with Liberty in 1998 (C.A. App., Tab 21 at 1-2).

At a hearing on the morning of October 14, 2005, Liberty informed the state court that it was going to remove the case later that day. At petitioners' request,[2] the state court immediately responded by issuing an order at the October 14 hearing that expanded its prior sanctions order to cover the entire

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[2] The Seventh Circuit later noted that petitioners asked that "all claims for payment by all insureds on all of these policies everywhere in the nation be covered by the default, so that [Liberty] would be compelled to pay without proof that an affiliate had failed to honor any policy." Pet. App. 3a. Petitioners contended that "[i]t should be enough * * * that an insurer disbursed less than the medical bill, regardless of any policy's actual terms." *Ibid.* As the Seventh Circuit recognized, acceptance of petitioners' position "would override co-payment requirements, caps on total indemnity, schedules of allowable fees, and many other common clauses." *Ibid.*

nationwide class on all claims, thereby denying Liberty a trial on the merits and ordering that the case "proceed with proof of damages" only. C.A. App., Tab 29. The state court thus parlayed its pre-certification sanctions order in what was then only an individual case involving "policies written by Liberty" into a class-wide finding of liability regarding policies issued and claims adjusted by thirty-five different insurers nationwide. The state court based this colossal class-action penalty on nothing more than petitioners' own error in failing to sue the company that was expressly named in the governing policies. Pet. App. 3a ("the plaintiffs have argued—and the state judge has held—that [Liberty] is liable because it did not do enough in discovery to alert plaintiffs' counsel to the need to substitute Liberty Fire as a defendant * * * despite the fact that only Liberty Fire's name is on the policies").

F. The Seventh Circuit Upheld Liberty's Second Removal.

On the afternoon of October 14, 2005, Liberty removed this case for a second time. C.A. App., Tabs 30-32. Liberty argued that removal was proper for two reasons. First, the class-certification order added new claims that do not relate back to petitioners' pre-CAFA pleadings and thus commenced a new action. *Id.*, Tab 32 at 3-18. Second, the class-certification order added claims based on group health policies issued by two Liberty affiliates that are completely preempted by ERISA. *Id.* at 18-19. The district court, per Judge Castillo, rejected both bases for removal and granted petitioners' motion to remand. Pet. App. 15a-26a.

In a unanimous opinion authored by Judge Easterbrook and joined by Judges Coffey and Manion, the Seventh Circuit granted Liberty's petition for leave to appeal and vacated the remand order. Pet. App. 1a-8a ("*Knudsen II*"). The court held that CAFA's substantive requirements were satisfied because "[t]he stakes exceed $5 million; more than two-thirds of the class members live outside Illinois; [and] mini-

mal diversity is established." *Id.* at 7a. The court then applied Illinois law in holding that the state court's class-certification order commenced a new action by adding new claims that do not relate back to petitioners' pre-CAFA pleadings. *Id.* at 5a.

In so holding, the Seventh Circuit explained that "[w]hat causes the class definition of September 2005 to initiate new claims is the fact that [Liberty] does not adjust all demands for payment of all of its affiliates' policies." Pet. App. 6a. The court provided two examples to prove its point. First, "Liberty Northwest Corporation, one of [Liberty's] affiliates, has adjusted claims against its own policies since 1996 using its own cost-and-utilization software." *Ibid.* The court noted that "[t]he complaint initially filed in this case could not have notified [Liberty] that plaintiffs contested any decision made by Liberty Northwest—nor did the complaint allege that [Liberty] and Liberty Northwest are alter egos." *Ibid.* Petitioners thus did not place Liberty "on notice of this claim for relief before February 18, 2005." *Ibid.*

Second, the Seventh Circuit noted that Employers Insurance of Wausau ("Wausau") "has employed a 'medical cost and utilization database' since 1985," long before it became affiliated with Liberty in 1998. Pet. App. 6a. Therefore, "the class includes all insureds (and their assignees) whose claims were adjusted by Wausau using its own data and methods back to 1985." *Ibid.* The court concluded that petitioners' pre-CAFA pleadings "did not even hint that [Liberty] might be accountable for underpayments on the Wausau policies, claims against which had been adjusted as long as 15 years earlier under a distinct system. Any effort to recover on account of these policies is a distinct claim for relief." *Id.* at 7a.

Emphasizing the narrow scope of its opinion, the Seventh Circuit explained that "a complaint alleging that [Liberty] mishandled its 'medical cost and utilization database' when adjusting demands for payment of medical bills would be one claim, whether [Liberty] or Liberty Fire had issued the pol-

icy." Pet. App. 5a. The court reasoned that "the grievance concerns the way that a particular 'medical cost and utilization database' works, and the number of different policies or issuers to which a single database and software package applies would be a detail, as long as [Liberty] itself did the adjustment work." *Id.* at 5a-6a. However, because the state court's class-certification order here added claims based on policies adjusted by others, "litigation has been commenced within the Act's coverage period," making removal proper under CAFA. *Id.* at 7a.

The Seventh Circuit denied petitioners' request for rehearing en banc, with no judge dissenting. Pet. App. 27a. The Bakers subsequently dismissed their individual claims with prejudice.

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the Seventh Circuit's decision. First, there is no conflict among the courts of appeals. Petitioners cite a few district court decisions in trying to manufacture conflicts among the lower courts concerning whether (and under what circumstances) post-CAFA conduct can commence a new action. But petitioners concede that courts must look to the law of the forum state in deciding whether post-CAFA conduct commences a new action and thus permits removal of a pre-CAFA case. Pet. 26. As a result, there can be no true conflict among the lower courts because decisions necessarily turn on the substance of varying state laws. In addition, all four courts of appeals that have considered the issue have agreed that post-CAFA conduct can commence a new action, with not a single appellate judge dissenting from that conclusion. What is more, the district court cases relied upon by petitioners have been overruled by subsequent decisions from the courts of appeals. In short, there is no conflict and no reason to believe that another court of appeals faced with similar facts would come out any differently than the court below.

Second, this case does not raise issues of sufficient importance to warrant this Court's review. In the first place, this Court does not sit to review decisions that—like the decision below—are based on the application of state law. Moreover, the Seventh Circuit's decision is of diminishing precedential importance because the number of pre-CAFA class actions that remain pending today is small and decreasing. Beyond this, the Seventh Circuit's decision provides only a narrow opening for defendants to remove pre-CAFA cases, with that court rejecting every other attempt to do so. The Seventh Circuit's decision is also of little precedential importance because the decision turned on highly unusual facts that are unlikely to recur: Petitioners took a pre-CAFA putative class that was limited to individuals covered by casualty policies issued by Liberty and turned it into a nationwide class action default judgment holding Liberty liable to individuals covered by all lines of insurance issued by not only Liberty but also thirty-five of its affiliates and subsidiaries. Thus, the Seventh Circuit's fact-bound decision is case-specific and inappropriate for this Court's review.

Finally, the Seventh Circuit's decision is plainly correct. Petitioners' position that post-CAFA conduct can never commence a new action lacks any support in either CAFA or its legislative history. To the contrary, petitioners' position would frustrate congressional intent by allowing plaintiffs to fundamentally transform pre-CAFA cases into class actions that bear little or no resemblance to the original pleadings. Moreover, the Seventh Circuit was clearly correct in holding that the state court's class-certification order added new claims that do not relate back to petitioners' pre-CAFA pleadings under Illinois law. The class-certification order added claims based on all lines of insurance issued and adjusted by thirty-five of Liberty's affiliates and subsidiaries. Petitioners' pre-CAFA pleadings—which were limited to claims based on casualty policies issued by Liberty and failed to even mention any of Liberty's affiliates and subsidiaries—plainly did not provide Liberty with notice that petitioners

would later seek to hold Liberty liable for the conduct of its affiliates and subsidiaries. Therefore, the state court's class-certification order commenced a new action under Illinois law and permitted Liberty to remove this case under CAFA.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH A DECISION FROM ANY OTHER COURT OF APPEALS.

According to petitioners, the lower courts have created two separate conflicts in deciding whether, and under what circumstances, post-CAFA conduct commences a new action in suits originally filed before CAFA's effective date. Pet. 23-24. First, petitioners contend that there is a conflict among the lower courts about whether post-CAFA conduct can ever commence a new action under CAFA. *Id.* at 23. Second, petitioners argue that the lower courts are divided as to whether the relation-back doctrine should be employed when deciding if the post-CAFA addition of a new defendant commences a new action. *Id.* at 24. In fact, the Seventh Circuit's decision does not conflict with a decision from any other court of appeals.

A. The Alleged Conflicts Are Entirely Illusory Because Courts Must Apply Differing State Laws To Determine Whether Post-CAFA Conduct Commences A New Action.

Petitioners concede that "[w]hether an action has been commenced here is governed by Illinois law." Pet. 26. Petitioners are correct to concede the point. CAFA does not define the term "commenced." Nor is there any federal statutory standard for determining the date that an action commences in state court. Therefore, federal courts necessarily must look to the law of the forum state to determine when a state court action commenced.

As the Fifth Circuit recently noted, "the courts of appeals that have examined the issue have unanimously held that when a lawsuit is initially 'commenced' for purposes of

CAFA is determined by state law." *Braud* v. *Transp. Serv. Co.*, 445 F.3d 801, 803 (5th Cir. 2006) (citing *Plubell* v. *Merck & Co.*, 434 F.3d 1070, 1071-1072 (8th Cir. 2006); *Bush* v. *Cheaptickets, Inc.*, 425 F.3d 683, 689 (9th Cir. 2005); *Natale* v. *Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Pritchett* v. *Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Knudsen I*, 411 F.3d 805 (7th Cir.)). The *Braud* court explained that "CAFA broadens diversity jurisdiction for certain qualifying class actions and authorizes their removal, and thus, 'given its context, CAFA's "commenced" language surely refers to when the action was originally commenced in state court.'" *Ibid.* "Furthermore, when an action is commenced in state court is determined based on the state's own rules of procedure." *Ibid.* (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 415 (2005) (looking to state law to determine when a pleading has been "properly filed" for purposes of a federal time limit); *Herb* v. *Pitcairn*, 324 U.S. 117, 120 (1945) ("Whether any case is pending in the Illinois courts is a question to be determined by Illinois law.")); see also *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (state law determines when an action commences for statute of limitations purposes).

Similarly, all of the circuits that have addressed the question have concluded that courts must apply the forum state's relation-back doctrine in deciding whether post-CAFA conduct commences a new action. *Phillips* v. *Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); *Plubell*, 434 F.3d at 1071-1074 (8th Cir.); see also *Prime Care, LLC* v. *Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006) (courts "generally agree that whether an amendment is distinct enough to give rise to a new commencement date is properly gauged by the forum state's law governing the relation-back of pleading amendments"). That conclusion is consistent with the uniform practice in the courts of appeals to rely on the forum state's relation-back law in determining the timeliness of amended pleadings that were filed in state court before removal. *Pac. Employers Ins. Co.* v. *Sav-A-Lot*, 291 F.3d 392,

400 (6th Cir. 2002) ("it is the version of the relation-back doctrine embodied in the Kentucky Rules, and not the version embodied in the Federal Rules, that governed the consequences of the filing of the amended complaint" in state court before removal); *Anderson* v. *Allstate Ins. Co.*, 630 F.2d 677, 682 (9th Cir. 1980) (state law governed whether the amended complaint related back "because the relevant amendments and service of process preceded removal to federal court").

Every state has an elaborate body of law defining when an action commences and when amendments relate back to timely pleadings. Like the federal rule, Fed. R. Civ. P. 3, many states measure "commencement" by the date the complaint is filed. But "some states may deem [an action] commenced when the filing fee is paid, or when the clerk finds the complaint procedurally sufficient * * * , or when the first (or last) defendant is served with process." *Schorsch* v. *Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005). Similarly, the lower courts have applied a wide array of state laws in determining whether post-CAFA conduct relates back to pre-CAFA pleadings. *E.g.*, *Cuesta* v. *Ford Motor Co.*, 2006 WL 1207608, at *3-4 (E.D. Okla. May 1, 2006) (Oklahoma law); *Whitehead* v. *Nautilus Group, Inc.*, 428 F. Supp. 2d 923, 926-928 (W.D. Ark. 2006) (Arkansas law); *Adams* v. *Ins. Co. of N. Am.*, 426 F. Supp. 2d 356, 372-377 (S.D. W. Va. 2006) (West Virginia law). Therefore, lower court decisions addressing when actions commence in state court and whether post-CAFA amendments filed in state court relate back to pre-CAFA pleadings necessarily turn on the substance of the varying laws of the forum state. As a result, there can be no true conflict among the lower courts because courts must apply the laws of different states to determine whether post-CAFA conduct commenced a new action.

B. The Courts Of Appeals Uniformly Hold That Post-CAFA Conduct Can Commence A New Action.

Petitioners cite a few stray decisions from *district courts* in the Eighth and Tenth Circuits in arguing that the lower courts are divided concerning whether post-CAFA conduct can commence a new actior in a case originally filed before CAFA's effective date. Pet. 23 (citing *Hot Spring County Solid Waste Auth.* v. *UnitedHealth Group*, 2006 WL 376545 (W.D. Ark. Jan. 13, 2006); *Comes* v. *Microsoft Corp.*, 403 F. Supp. 2d 897 (S.D. Iowa 2005); *Weekley* v. *Guidant Corp.*, 392 F. Supp. 2d 1066 (E.D. Ark. 2005)); see also Pet. 26 (citing *Plummer* v. *Farmers Group, Inc.*, 388 F. Supp. 2d 1310 (E.D. Okla. 2005)). In *Hot Spring* and *Comes*, the district judges relied on *Weekley* in stating that post-CAFA conduct can never commence a new case. *Hot Spring County Solid Waste Auth.*, 2006 WL 376545, at *2; *Comes*, 403 F. Supp. 2d at 903; *Weekley*, 392 F. Supp. 2d at 1067-1069. And in *Plummer*, the district court used a relation-back analysis in holding that a post-CAFA amended complaint commenced a new action, but stated in dicta that it "would prefer a bright line test: *i.e.*, that a claim is commenced with the filing of the original complaint." 388 F. Supp. 2d at 1314-1317.

However, all four courts of appeals that have considered the question—including the Seventh Circuit's decision below—have rejected the position stated in the district court cases cited by petitioners and have instead held that post-CAFA conduct can commence a new action. *Knudsen II*, Pet. App. 7a (7th Cir.) ("a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act"); *Prime Care*, 447 F.3d at 1289 (10th Cir.) ("we hold that whether a post-CAFA amendment triggers a substantive right of removal under CAFA by the affected parties depends on whether the amendment relates back to the pre-CAFA pleading that is being amended"); *Braud*, 445 F.3d at 804 (5th Cir.) (post-CAFA "amendments that add a defendant 'commence' the civil action as to the

added party"); *Plubell*, 434 F.3d at 1071 (8th Cir.) (propriety of removal based on a post-CAFA amended complaint depends on "whether the amendment relates back or is instead a new action").

Moreover, the district court decisions relied upon by petitioners are no longer good law even within their own circuits. In *Plubell*, the Eighth Circuit overruled the prior decisions in *Hot Spring*, *Comes*, and *Weekley* by holding that post-CAFA conduct can commence a new action if the conduct does not relate back to the plaintiff's pre-CAFA pleadings. 434 F.3d at 1071; see also *Braud*, 445 F.3d at 804 n.7 (*Weekley* "has been rejected by implication by the circuit court from that jurisdiction"). Indeed, post-*Plubell* decisions issued by district courts in the Eighth Circuit have used a relation-back test to determine whether post-CAFA conduct commenced a new action. *E.g.*, *Whitehead*, 428 F. Supp. 2d at 926-928; *Berry* v. *Volkswagen of Am., Inc.*, 2006 WL 344774, at *1 (W.D. Mo. Feb. 15, 2006). In addition, the Tenth Circuit has rejected the *Plummer* dicta by holding that post-CAFA conduct can commence a new action. *Prime Care*, 447 F.3d at 1289.

It is no surprise that, like the Seventh Circuit in this case, the overwhelming majority of district courts to have addressed the question have used a relation-back analysis to determine whether post-CAFA conduct commenced a new action, rather than the absolutist position adopted in cases like *Weekley*.[3] Therefore, the overruled district court deci-

[3] *E.g.*, *Briggs* v. *GEICO Gen. Ins. Co.*, 2006 WL 1897210, at *1-2 (D. Colo. July 10, 2006); *In re Audi Litig.*, 2006 WL 1543752, at *2-6 (N.D. Ill. June 1, 2006); *Cuesta*, 2006 WL 1207608, at *3-4; *Whitehead*, 428 F. Supp. 2d at 926-928; *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 2006 WL 1004725, at *4, *6 (S.D.N.Y. Apr. 17, 2006); *Adams*, 426 F. Supp. 2d at 372-381; *Carpanelli* v. *Am. Standard Cos.*, 2006 WL 568307, at *2-5 (N.D. Cal. Mar. 3, 2006); *Berry*, 2006 WL 344774, at *1; *Werner* v. *KPMG LLP*, 415 F. Supp. 2d 688, 704-710 (S.D. Tex. 2006); *Eufaula Drugs, Inc.* v. *ScripSolutions*, 2005 WL 2465746, at *3-5

sions relied upon by petitioners are of no continuing significance.

In addition, the district court decisions relied upon by petitioners are easily distinguishable from this case on their facts. In *Hot Spring*, the defendant based removal solely on the post-CAFA addition of two of the plaintiff's employees as class representatives. 2006 WL 376545, at *1. In *Comes*, the defendant based removal on the post-CAFA addition of factual allegations in support of claims that the plaintiffs had already alleged in pre-CAFA pleadings. 403 F. Supp. 2d at 902-904. And in *Weekley*, the defendant based removal on a one-sentence document filed after CAFA's enactment that added class allegations and sought to hold the defendant liable for its manufacture of cardiac devices in addition to the pacemaker that formed the basis for the pre-CAFA complaint. 392 F. Supp. 2d at 1066. Thus, none of the post-CAFA conduct that took place in the cases relied upon by petitioners comes close to what occurred here, where the state court took a pre-CAFA putative class of individuals covered by casualty policies issued by Liberty and turned it into a nationwide class action default judgment holding Liberty liable to all persons covered by any type of policy issued by Liberty and thirty-five of its affiliates and subsidiaries. There is simply no reason to believe that *any* court would decide *this* case differently than the Seventh Circuit.

C. This Case Does Not Present The Second Conflict Alleged By Petitioners.

Petitioners contend that the courts of appeals are divided concerning whether to use a relation-back analysis in deciding if the post-CAFA addition of a new defendant commences a new case. Pet. 23-24. But the Seventh Circuit based its decision on the post-CAFA "addition of new claims," not new defendants. Pet. App. 7a. The Seventh

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(M.D. Ala. Oct. 6, 2005); *Heaphy* v. *State Farm Mut. Auto. Ins. Co.*, 2005 WL 1950244, at *3-5 (W.D. Wash. Aug. 15, 2005).

Circuit had no occasion to address the addition of new defendants because petitioners did not add any new defendants; Liberty remains the lone defendant in this case. Petitioners' request that the Court reach out to resolve an alleged conflict untethered to the facts of this case should be rejected.

II. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION WARRANTING RESOLUTION BY THIS COURT.

Even if there were a conflict among the lower courts on any of the issues raised by petitioners—and there is not—there are a number of reasons why this case is not appropriate for this Court's review. First, as petitioners concede and as we discuss above, the question whether (and under what circumstances) post-CAFA conduct commences a new action depends on the forum state's law. Pet. 26; Section I.A, *supra*. Petitioners' position thus amounts to a claim that the Seventh Circuit misapplied Illinois law. This Court does not grant certiorari to review applications of state law. Sup. Ct. R. 10.

Second, the question whether (and under what circumstances) post-CAFA conduct commences a new action is of diminishing importance. CAFA is now almost eighteen months old. There are only a limited number of class actions filed before CAFA's enactment that remain pending today—and that number decreases by the day. Therefore, a decision addressing the removal of pre-CAFA class actions would affect only a small and shrinking number of cases.

Third, contrary to petitioners' implication that the Seventh Circuit's decision opened floodgates, in reality it provides a very narrow opening for the removal of pre-CAFA cases. Indeed, the Seventh Circuit has rejected the removal of pre-CAFA cases in every other opinion it has issued, explaining that "a routine amendment to the complaint does not commence a new suit." *Schorsch*, 417 F.3d at 749; see *Natale* v. *Gen. Motors Corp.*, 2006 WL 1458585, at *2 (7th Cir.

May 8, 2006); *Phillips*, 435 F.3d at 787-788; *Schillinger* v. *Union Pac. R.R. Co.*, 425 F.3d 330, 334 (7th Cir. 2005); *Pfizer, Inc.* v. *Lott*, 417 F.3d 725, 726 (7th Cir. 2005). In *Schillinger*, for example, the Seventh Circuit held that removal of a pre-CAFA case was improper even though the plaintiffs filed a post-CAFA amended complaint that expanded the class from Illinois landowners to include landowners nationwide. 425 F.3d at 334. And in *Schorsch*, the court held that removal of a pre-CAFA case was improper even though the plaintiff's post-CAFA amended complaint expanded the proposed class from consumers of one printer product manufactured by the defendant to include consumers of two other printer products that the defendant manufactured. 417 F.3d at 750-751. Reported decisions from district judges in the Seventh Circuit have followed that court's lead, rejecting every removal of pre-CAFA cases with just one exception.[4] Therefore, the decision below has not opened the door to removal of pre-CAFA cases. Rather, the Seventh Circuit's decision is merely the rare exception that proves the general rule: the removal of cases initially filed before CAFA is not permitted absent extraordinary circumstances.

Fourth, the decision below is fact-bound. The Seventh Circuit carefully distinguished its prior decisions in *Schillinger* and *Schorsch* based on the extraordinary facts presented by this case. Pet. App. 5a-7a. Petitioners' own arguments for reversal demonstrate the fact-bound nature of the decision

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[4] *In re Audi Litig.*, 2006 WL 1543752, at *6 (N.D. Ill. June 1, 2006); *In re Sears, Roebuck & Co.*, 2006 WL 1517779, at *4 (N.D. Ill. May 24, 2006); *Miller* v. *Hypoguard USA, Inc.*, 2006 WL 1285343, at *7 (S.D. Ill. May 8, 2006); *Bemis* v. *Allied Property & Cas. Ins. Co.*, 2006 WL 1064067, at *6 (S.D. Ill. Apr. 20, 2006); *Komeshak* v. *Concentra, Inc.*, 2005 WL 2488431, at *2-3 (S.D. Ill. Oct. 7, 2005); *Alsup* v. *3-Day Blinds*, 2005 WL 2094745, at *2-3 (S.D. Ill. Aug. 25, 2005); *Smith* v. *Pfizer, Inc.*, 2005 WL 3618319, at *5 (S.D. Ill. Mar. 24, 2005). Compare *Schillinger* v. *360Networks USA, Inc.*, 2006 WL 1388876, at *4-6 (S.D. Ill. May 18, 2006) (removal was proper because post-CAFA addition of new defendant did not relate back to pre-CAFA pleadings).

below. Petitioners contend, for example, that the Seventh Circuit erred by finding that the class certified by the state court included claims adjusted by Liberty's affiliates and subsidiaries. Pet. 25. But even if petitioners were correct—and they are not—petitioners' position amounts to little more than a claim that the Seventh Circuit made erroneous factual determinations. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Petitioners fail to address any of the foregoing reasons showing why this case is unworthy of this Court's review. Instead, petitioners suggest only that this case merits review because the Seventh Circuit's decision is "disruptive of federal-state comity." Pet. 29. That is clearly incorrect. In enacting CAFA, Congress resolved the question of "federal-state comity" in favor of removal by providing for federal jurisdiction over putative class actions like this case. 28 U.S.C. § 1453(b); see also 28 U.S.C. § 1332(d). Petitioners offer no reason why this Court should disturb Congress's considered policy judgment.

III. THE SEVENTH CIRCUIT'S DECISION IS PLAINLY CORRECT.

The decision below is consistent with CAFA, Illinois law, and common sense. First, the Seventh Circuit was clearly correct in holding that post-CAFA conduct can commence a new action. As the Tenth Circuit explained, "the unqualified disregard of any post-CAFA pleading amendments * * * entails the practically untenable result that once a pre-CAFA case is filed, the plaintiff can tack on new causes of action so substantively independent of the original case that they would be properly treated as filed after CAFA's effective date for all legal purposes controlled by Rule 15(c) *except for CAFA*." *Prime Care*, 447 F.3d at 1288 n.4. Nothing in CAFA or its legislative history requires such an absurd result. Petitioners' argument (Pet. 26) that "a claim is 'com-

menced' for purposes of CAFA only with the filing of the original complaint" is therefore without merit.[5]

Second, the Seventh Circuit was plainly correct in finding that the state court's class-certification order dramatically changed the case by adding new claims based on policies issued and adjusted by Liberty's affiliates and subsidiaries. Contrary to petitioners' contention that the new post-CAFA class definition was limited to claims adjusted by Liberty, Pet. 25, in reality the class definition expressly included "[a]ll insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries * * * whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database." C.A. App., Tab 18 at 2; see also *id.*, Tab 16 at 12-13. If petitioners' contention were correct, then the class definition would read "[a]ll insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries * * * whose claims were [*adjusted by Liberty Mutual Insurance Company and were*] paid for less than the medical charge, based upon [*Liberty Mutual Insurance Company's*] application of a medical cost and utilization database." The class definition adopted by the state court, however, contained no such limitations.

Petitioners suggest that if the Seventh Circuit "had any doubts on this score," it should have asked the state court to "issue a ruling on whether the amended class included those claims made by insureds of Liberty, its affiliates and subsidiaries which Liberty did *not* adjust." Pet. 25-26. But there could be no "doubts on this score" because the plain language of the class definition clearly encompassed claims adjusted by Liberty's affiliates and subsidiaries. Moreover, a

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[5] In fact, petitioners waived the argument that post-CAFA conduct can never commence a new action by failing to raise the argument to the panel below. *E.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) (issue waived "because it was not raised or briefed below"); see also *Hoover* v. *Ronwin*, 466 U.S. 558, 574 (1984) (refusing to consider argument made "for the first time in [a] motion for rehearing in the Court of Appeals")

federal court faced with a removal petition has only two options: remand or accept jurisdiction. Petitioners cite no authority suggesting that there is a third option that allows federal courts to certify questions to state courts in order to determine the propriety of the removal. To the contrary, this Court has long held that "events occurring subsequent to removal" are irrelevant in deciding whether federal jurisdiction exists. *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 293 (1938). Thus, petitioners' suggestion that the Seventh Circuit should have asked the state court whether the class definition included claims based on policies adjusted by Liberty's affiliates and subsidiaries—a suggestion that petitioners never made in the Seventh Circuit—is wholly without merit.

Third, the Seventh Circuit correctly held that the new claims added by the class-certification order do not relate back to petitioners' pre-CAFA pleadings. Illinois law provides that an amended pleading relates back to a timely pleading when "the cause of action asserted * * * in the amended pleading grew out of the same transaction or occurrence set up in the original pleading." 735 ILCS 5/2-616(b). Thus, an amended pleading relates back when the original complaint "furnished to the defendant all the information necessary for him to prepare a defense to the claim subsequently asserted in the amended complaint." *Boatmen's Nat'l Bank* v. *Direct Lines, Inc.*, 656 N.E.2d 1101, 1107 (Ill. 1995).

Petitioners' pre-CAFA pleadings did not even come close to providing Liberty with "all the information necessary" to defend against the claims added by the state court's class-certification order. Petitioners limited their pre-CAFA pleadings to claims based on casualty policies issued by Liberty alone. C.A. App., Tab 2 ¶ 11. Petitioners thus failed to provide Liberty with notice that they would later seek to hold Liberty liable for the conduct of its affiliates and subsidiaries,

none of which were even mentioned in petitioners' pre-CAFA pleadings.

To take just one example, the class-certification order added claims based on policies issued by Wausau, an affiliate of Liberty. Pet. App. 6a. Wausau adjusted claims under its own policies using its own medical cost and utilization database since 1985, long before it became affiliated with Liberty in 1998. *Ibid.* As the Seventh Circuit correctly held, petitioners' pre-CAFA pleadings "did not even hint that [Liberty] might be accountable for underpayments on the Wausau policies." *Id.* at 7a. Furthermore, as *Knudsen I* noted, petitioners' pre-CAFA pleadings "had not made an alter-ego or veil-piercing argument." *Id.* at 6a. Although petitioners apparently "changed their tune" following the remand from *Knudsen I*, *ibid.*, Illinois law provides that "where one complaint alleges liability predicated upon defendant's own actions and the other complaint alleges defendant to be liable for the actions of, or an incident caused by, another, the amended complaint is unlikely to relate back to the original one." *Kennedy* v. *King*, 623 N.E.2d 955, 958 (Ill. App. Ct. 1993). Accordingly, the Seventh Circuit correctly held that the class-certification order's addition of claims seeking to hold Liberty liable for the conduct of its affiliates and subsidiaries does not relate back to petitioners' pre-CAFA pleadings under Illinois law.[6]

Petitioners advance three principal arguments in contending that the post-CAFA claims added by the state court's class-certification order relate back to petitioners' pre-CAFA pleadings, none of which has any merit. First, petitioners contend that the state court's massive expansion of the putative class was "routine" and justified by the default judgment entered against Liberty. Pet. 27. As an initial matter, the

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[6] The result would be the same under federal law because Illinois' relation-back rule is "functionally identical" to Fed. R. Civ. P. 15(c). *Schorsch*, 417 F.3d at 751.

state court's addition of claims based on all lines of insurance issued and adjusted by Liberty and thirty-five of its affiliates and subsidiaries can hardly be described as "routine." Indeed, if Liberty could not remove this case under CAFA, then it is difficult to imagine *any* pre-CAFA case that could be removed. Moreover, there is nothing routine about a massive class-certification based on a default judgment. To the contrary, the courts of appeals agree that a default judgment may not be used to certify a class action. *E.g.*, *Partington* v. *Am. Int'l Specialty Lines Ins. Co.*, 443 F.3d 334, 341 (4th Cir. 2006); *Davis* v. *Hutchins*, 321 F.3d 641, 648-649 (7th Cir. 2003).

Second, petitioners argue that "Illinois law entitled the petitioners to correct by amendment the misnomer of the petitioners' class * * * without the amendment kicking off a new action for purposes of CAFA." Pet. 27-28. But petitioners have long known that Liberty Fire—not Liberty—issued the policies underlying their claims. Petitioners thus had ample opportunity to add Liberty Fire as a defendant or amend their complaint to allege that Liberty is liable for Liberty Fire's conduct on an alter ego theory. And even if petitioners were confused about Liberty Fire's role in this case, that would not explain the class-certification order's addition of claims based on policies issued by thirty-four of Liberty's other affiliates and subsidiaries. Petitioners' "misnomer" contention is thus plainly incorrect.

Finally, petitioners' suggestion (Pet. 28) that their position is "most consistent" with *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), is completely baseless. In *American Pipe*, this Court held that the commencement of a putative class action tolls the statute of limitations on individual class members' claims. *Id.* at 552. The Seventh Circuit's decision will not result in any putative class member losing a right to proceed based on a statute of limitations. In fact, petitioners' reliance on *American Pipe* betrays a fundamental misconception about the Seventh Circuit's use of the

relation-back doctrine to determine whether the state court's class-certification order commenced a new action. In deciding whether post-CAFA conduct commences a new action, "courts do not apply relation-back rules because the CAFA issue turns on a limitations bar or because limitations has any role in the analysis." *Werner* v. *KPMG LLP*, 415 F. Supp. 2d 688, 700 (S.D. Tex. 2006). "Rather, the relation-back concept is applied as an analytic tool, a way of determining whether amended pleadings so change the claims or parties as to be a new civil action, rather than a 'workaday change' that continues a pending action." *Ibid.* Therefore, neither *American Pipe* nor the statute of limitations has any relevance to this case. Petitioners will be fully able to pursue their claims in the forum that Congress designated: the United States District Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006